IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 117

FRANK D. THOMPSON

TRUSTEE IN BANKRUPTCY OF

HERBERT E. MOORE, BANKRUPT

PLAINTIFF IN ERROR

vs.

HENRY FAIRBANKS

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

Defendant's Brief.

STATEMENT OF CASE.

April 15, 1891, Fairbanks, the defendant in error, took a chattel mortgage from Moore, the bankrupt, of his livery stock located in St. Johnsbury, Vermont. The property mortgaged is described in the mortgage as, "All my livery property, consisting of horses, wagons, sleighs, vehicles, harnesses, robes, blankets, etc.; also all horses and other livery property that I may purchase in my business or acquire by exchange."

At the time the mortgage was given, it was agreed and understood by the parties to it that Moore might sell or exchange any of the livery stock as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired, and that all after acquired livery property should be covered by the mortgage as security for the debts specified therein.

The mortgage was conditioned to pay said Fairbanks all said Moore then owed him, or might thereafter owe him, on note, book account, or in any other manner, and save him, "harmless and indemnified from paying any commercial paper on which he has become, or may hereafter become, holden in any manner for my benefit as surety, endorser, or otherwise."

The mortgage was executed and recorded in compliance with the statutes of Vermont. The defendant had then incurred obligations on the bankrupt's commercial paper to aid him in purchasing the livery property to quite a large amount, which liability, by renewals, continued to May 16, 1900, when defendant took possession of the livery property, with bankrupt's consent, and foreclosed his mortgage. The bankrupt was then also owing

defendant between $200 and $300, most of which was then overdue. Moore continued in possession until May 16, 1900, when defendant took possession, and in the interim had by exchange or by purchase with the avails of the original livery property procured other livery property, so that the livery property taken possession of was mostly acquired subsequently to the execution of the mortgage. The exchanges were made sometimes with and sometimes without the advice and consent of the defendant. All the after acquired livery stock, as it existed on May 16, 1900, was acquired by exchange of the original stock, or with the avails of said stock sold, or the money derived from the business, and "was acquired by Moore with the full understanding and intent that it should be covered by defendant's mortgage of April 15, 1891."

The defendant took possession of the livery property, under his mortgage, not with intent to perpetrate any fraud on any of the other creditors, but with the intent to make the livery property available for the payment of his debt before other complications arose. June 11, 1900, defendant caused the property to be sold in the foreclosure of his mortgage by the sheriff. June 30, 1900, Moore filed a voluntary petition in bankruptcy, was adjudged a bankrupt, and Thompson was appointed trustee of his estate. Moore was insolvent as early as March 5, 1900. The referee found, on some testimony objected and excepted to by defendant, that the defendant and his attorney knew bankrupt was insolvent at the time defendant took possession of the livery property, May 16, 1900, but defendant's exception to this finding was sustained by county court, and judgment rendered for defendant to recover his costs. Thompson excepted to this judgment, which the Supreme Court affirmed, without

considering the admissibility of the testimony excepted to before the referee by defendant.

The plaintiff in error brought suit in the proper county court to recover the value of the property taken and sold by defendant under his mortgage, less the costs of the sale by the sheriff, being $922.08, which included what was received for two horses covered by the mortgage when executed, claiming that defendant's lien, under his mortgage and foreclosure proceedings, which were conceded to be regular, was invalid against the creditors of the bankrupt. The defendant pleaded the general issue, and gave notice under the statute of the existence of the mortgage April 15, 1891, of the foreclosure of the same, and of the receipt therefrom, less expenses of making the foreclosure, of $922.08. By consent of the parties, the cause was referred to a referee selected by the parties, who heard the case, found the facts, and reported to the court.

After the final judgment for the defendant in the Supreme Court of Vermont, the plaintiff brought this writ of error to have the claimed federal errors of the Supreme Court of Vermont heard by this Court. The defendant filed a motion, and a brief in its support, to have the writ of error dismissed for want of jurisdiction of the same by this Court.

ARGUMENT.

The defendant still insists upon his motion to dismiss, and asks that his brief already filed may be considered. In addition to the point taken in that brief, he submits other points.

1. The plaintiff has no personal interest in the subject matter involved in his suit, and hence is not entitled to a writ of error. He is trustee and representative of the bankrupt and his creditors. His only interest is that of an official.

Smith vs. Indiana ex. rel. Lewis, 191 U. S., 138, L. Ed., 48, 125.

Tyler vs. Registration Court Judges, 179 U. S., 405, 45 L. Ed., 252.

Turpin vs. Leman, 187 U. S , 51, 47 L. Ed., 70.

Lampassas vs. Bell, 180 U. S., 276, 45 L Ed., 527.

Ludeling vs. Chaffee, 143 U. S., 301, 36 L. Ed., 313.

Gilis vs. Little, 134 U. S., 645, 33 L. Ed., 1062.

2. The courts of Vermont, in trying and deciding the issue tendered by the pleadings, were not exercising jurisdiction in their behalf conferred by the constitution and laws of the State of Vermont, but were exercising jurisdiction conferred by the national bankrupt act of 1898, Section 23, *a* and *b*. The title of this section is, "Jurisdiction of United States and State Courts."

"Section 23 Jurisdiction of United States and State Courts:

a. The United States circuit courts shall have jurisdiction of all controversies at law and in equity, as distinguished from proceedings in bankruptcy between trustees, as such, and adverse claimants concerning the property acquired or claimed by the trustees, in the same manner and to the same extent only as though bankruptcy proceedings had not been instituted and such controversies had been between the bankrupts and such adverse claimants.

b. Suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt, whose estate is being administered by such trustee, might have brought or prosecuted them if proceedings in bankruptcy had not been instituted, unless by consent of the proposed defendant."

By *b* of this section, the trustee was compelled to bring the suit in the state court.

Bardes vs. Hawarden, 178 U. S., 525; 44 L. Ed., 1175.

Wall vs. Cox, 181 U. S., 244; 45 L. Ed., 845.

He is the creature of the act, and derives all his authority and rights therefrom. National bankruptcy laws can only be enacted by Congress. The states have no power to enact them, nor to give their courts jurisdiction to try and determine any rights given by such laws. Hence, it follows that the national laws, giving this court the right in certain instances to review and revise the errors of state courts, have no application, and give this court no jurisdiction of this writ of error. Such is the manifest intention of the provisions of the act of 1898. Immediately following this section, section 24 treats of the jurisdiction of appellate courts, and section 25 of appeals and writs of error. The claim litigated must be $500 or over to entitle a party to an appeal, and over $2000 to entitle a party to a writ of error. These sections in terms relate to appeals and writs of error in United States courts; also given jurisdiction by the act to adjudicate matters and claims under it. But the courts where by section 23*b* the trustee is obliged to bring suits therein prescribed are by virtue thereof United States courts for the purposes there defined.

No other provisions are made for writs of error in the act of 1898. It therefore must follow that either no writs of error can be brought to review the decisions of state courts when acting under the authority conferred by the act, or the limitation that the amount in controversy must exceed $2000 must apply to cases brought under it in state courts, as well as cases brought in U. S. courts. This is the only conclusion that can be reached when all the provisions of the act on this subject are considered. Unless this be so, trustees under this act can flood this court with writs of error, claiming a federal question has arisen and been decided against them in the state courts exercising jurisdiction in Vermont under the

act of 1898, wherein the amount in controversy does not exceed $20: for claims of that amount brought before a justice of peace can be taken to the county courts, and thence by exceptions to the Supreme Court of the State.

If the amount in controversy in this case had been only $20, it would be somewhat startling to the profession, to the country, and to this court; also, if on the facts established, this court should find itself compelled to decide that the plaintiff was entitled to maintain a writ of error, and put the defendant to the expense of defending against it, after he had been to the expense of defending against the claim through all the courts of Vermont. The purpose of this and every bankrupt law is to gather and distribute to the bankrupt's creditors his property available for the payment of their debts as speedily and inexpensively as possible. It is commonly understood that section 23*b* is an amendent to the act as originally drawn to answer the objection that without it under *a* of this section, the trustee could put defendants in such suits to an unreasonable expense. If such was the reason and purpose for inserting *b*, it will be defeated wholly, if the trustee can bring defendants to this court on writs of error if he should claim in the state court that some provision of the act should have other and different force or application than given to it by the court in which the act compels him to try the question and construe the provisions of the act.

All provisions of a statute relative to the same subject matter are to be considered in determining what construction should be given to particular parts so as to effectuate reasonably the intent and purpose of the enacting power. The Act of 1898 gives jurisdiction to the state courts to try and determine federal questions, if they arise in such cases, and submit such questions to the determinations of

the state courts. Such trials and determinations are by virtue of the Act of 1898, and not by virtue of state constitution and laws. Hence, if the act makes no provisions for writs of error to this court in such cases, writs of error cannot be brought, and this court has no jurisdiction to entertain them.

Section 26, of the Act of 1898, provides for arbitration of controversies. Manifestly the trustee would not be entitled to a writ of error in this court to correct claimed errors in deciding federal questions arising in such arbitrations, because the act does not give him any such remedy. No more has he right to bring a writ of error under Section 23, *a.* and *b.* if the act does not give him such right.

When the trial and determination of such claims is by the United States Court, under the jurisdiction given by Section 23, *a.* and *b.*, provision has to be made for writs of error in case federal questions arise and the amount in controversy exceeds $2000. This provision is useless if they can be brought without some provision of the act. This court would be without jurisdiction to entertain them unless authorized by this provision. Unless this provision applies also to determinations of state courts given jurisdiction to try and determine such claims by this act, then there is no power given this court to entertain them. If this provision applies to trials in state courts, then, this writ must be dismissed for the amount in controversy is less than $2000.

3. Under the pleading, the trustee assumed the burden of establishing that the money in the defendant's hands, received from the foreclosure of his mortgage of April 15, 1891, should be paid to him for distribution among the creditors of the bankrupt. By bringing general assumpsit in the common courts he sues for this money as money had

and received by the defendant for his benefit, on the assumption that it came regularly and rightfully to the defendant for him. The defendant alleges that this money belongs to him to pay what the bankrupt owed him, and to secure him for liabilities which he incurred for the bankrupt before or at the time the bankrupt gave him the chattel mortgage of April 15, 1891, through the foreclosure of which this money came to him. One of the bankrupt's creditors had attached some of the property from which the money came before the defendant took possession and recovered this money through the foreclosure of his mortgage. This attachment became void by the adjudication of bankruptcy being made within four months of the filing of the petition to have him adjudicated a bankrupt. If this creditor acquired any rights, he acquired them for himself alone. None of the other creditors of the bankrupt made any move to acquire any rights in this property before defendant took possession. The bankrupt did no act that gave any of his creditors any rights in the property the defendant took possession of. The defendant's mortgage, in all respects, was executed and recorded as required by the laws of Vermont, and was a valid mortgage of the two horses which remained of the original property mortgaged, without defendant's taking possession. Possession was only necessary, at most, of the after acquired livery property. The record of the mortgage was constructive notice in regard to the property covered by it to all who undertook to gain any rights to such property. All the bankrupt's creditors must be held to have notice of the defendant's mortgage and contents in regard to the after acquired property. The defendant contended in the Supreme Court of Vermont, that under its decisions the defendant's mortgage was valid in regard to the after acquired property without defendant taking possession of

the same, as shown by his brief in that court. The Supreme Court of Vermont, without deciding this contention, held it was good by his taking possession of the after acquired property, before any lien, or right of any of bankrupt's creditors that became fixed, had intervened. By the decisions of the State of Vermont in regard to after acquired property, made years before the Bankrupt Act of 1898 was enacted, it had become the settled law of the state that a chattel mortgage which covered original and after acquired personal property was good and valid between the parties, and could at any time, except as to intervening rights, be made good against anybody by the mortgagee taking possession of the after acquired property.

(See Vermont cases hereinafter cited.)

Under the Bankruptcy Act of 1898, the trustee could only bring suit for the recovery of this property in the state court.

Bardes vs. Hawarden Bank, 178 U. S., 534.

Wall vs. Cox, 181 U. S., 244.

In the suit which he did so begin, the highest court of the state has given final judgment against him. The Bankruptcy Act itself provides no method for reviewing that judgment in this court. A federal question must have been presented, must have been decided adversely to the plaintiff in error, and the judgment of the state court must necessarily have rested upon that decision, in any event, to give him such right.

The Vermont court held that the Fairbanks mortgage of 1891, was a valid common law mortgage on the after-acquired property; that while such a mortgage might not be valid on the after-acquired property if other rights had intervened and became fixed before the defendant took possession under his mortgage, he having taken possession under it before such right had intervened and

become fixed, the mortgage gave the mortgagee the right of possession, and that by taking such possession his title under the mortgage was valid, and related back to the date of the mortgage itself. If no stipulation in the mortgage to the contrary, the mortgagee has the right to take possession any time under his mortgage. By such taking possession, after-acquired goods came under cover and operation of mortgage as of its date.

McLeod vs. Wakefield, 70 Vt., 558.
Longey vs. Leach, 57 Vt., 377.
Enright vs. Dodge, 64, Vt., 502.

The following is the language of the Supreme Court of Vermont upon this point.

"The referee found that at the time this mortgage was given, it was agreed and understood by the parties thereto, that the mortgagor should sell or exchange any of the livery stock covered by the mortgage as he desired, and should thereby and by purchase or otherwise keep the stock good so that the defendant's security should not be impaired; and that all after-acquired livery property should be covered by the mortgage as security for the debts specified therein; that pursuant to such understanding and agreement, the mortgagor made sales, purchases, and exchanges of livery stock to such an extent that on May 16, 1900, when the defendant took possession of the property under his mortgage, there only remained two certain horses of the property on hand at the time the mortgage was given; that these sales, exchanges and purchases were made by the mortgagor, sometimes without communication with or advice from the defendant, and frequently after consultation with him; that the livery stock as it existed when the defendant took possession of it was all acquired by exchange of the original stock or with the avails of the old stock sold,

or the money derived from the business; and that all the property of which the defendant took possession was acquired by Moore with the full understanding and intent that it should be covered by the defendant's mortgage.

The property expressly described in the mortgage was the mortgagor's livery property and the after-acquired property was, by the description, all horses and other livery property that he might purchase in his business or acquire by exchange. In principle there is no difference between a mortgage on such livery property, with acquisitions by purchase or exchange to keep the property in quality and value equal to what it was when the mortgage is given, and a mortgage on a stock of goods with acquisitions by purchase to keep the stock from depletion by sales in the common course of business. That the mortgage in question is good at common law between the parties to it, and that when the mortgagee took possession of the property under it with the consent of the mortgagor, it became a good and valid mortgage on the property, including that acquired subsequent to the giving of the mortgage, except as against intervening rights of creditors or other third persons, if any, and that such property came under the cover and operation of the mortgage as of date, are questions too well settled in this state to need further discussion.

Peabody vs. Landon, 61 Vt., 318.
15 Amer. St. Rep., 903.
Rice's Assignee's vs. Hulett, 63 Vt., 321.
In re Allen's Estate, 65 Vt., 392.
McLoud vs. Wakefield, 70 Vt . 558."

The Vermont court held, therefore, that Fairbanks had title to this property as of April 15, 1901. This holding depended entirely upon the construction of the

state law, and is not reviewable by this court. If correct, it disposes of the case, for a title acquired in 1891 could not be affected by proceedings in bankruptcy begun in 1900. This entitled the defendant to judgment in his favor for the money in controversy. Whatever the Vermont court said later in its opinion as to the application of certain provisions of the Bankruptcy Act was entirely unnecessary to the judgment finally rendered by that court. Hence, this court has no jurisdiction, even though the state court did discuss a federal question, and did decide that the contention of the plaintiff in error was inapplicable.

> "It is axiomatic that, in order to give this court jurisdiction on writ of error to the highest court of a state in which a decision in the suit could be had, it must appear affirmatively not only that a federal question was presented for decision by the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. And where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented."
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> California Powder Works vs. Davis, 151 U. S., 389, 393.
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> Eustis vs. Bolles, 150 U. S., 361.
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> Rutland Railroad Co. vs. Central Vt. R. R. Co., 159 U. S., 630.
>
> Harrison vs. Morton, 171 U. S., 38.

The point passed upon by the Vermont court as above concerns the title of Fairbanks to the property, not the effect of bankruptcy proceedings upon that title; but this

holding is decisive, for if he had such title as the court declared, there is no possible theory upon which bankruptcy could affect it.

Scott vs. Kelley, 89 U. S., 57.

The trustees' writ of error should be dismissed.

4. If this court has jurisdiction of this writ of error, the Supreme Court of Vermont committed no error in disposing of the federal questions, if any, therein raised by the plaintiff. What were the rights of the defendant under his mortgage of April 15, 1891, is determined by the laws of Vermont, interpreted by its Supreme Court, and is not reviewable in this court.

a. The defendant contended that by one course of decisions of the Supreme Court of Vermont, the defendant's mortgage was valid against all interests without his taking possession of the after acquired property under his mortgage. The Supreme Court of Vermont in its decision neither adopted nor denied this contention. If it is sound, under the decisions of Vermont Supreme Court, no federal question could be raised in regard to the validity of the rights of the defendant under his mortgage for it fully covered the existing and after acquired property from its execution, and all which the defendant did under it to bring the money in controversy into his possession and make the money his own, were acts of foreclosing a mortgage valid from its execution of the after acquired property.

The defendant's contention on this point was as follows:

"The chattel mortgage of April 15, 1891, was valid as to all of the property sold by the sheriff, not alone between the parties to it, but as against attaching creditors and purchasers. Livery property is kept for use as a going concern unlike the property mortgaged in Peabody vs. Landon kept for sale to secure a profit. In prin-

ciple it is like the personal property involved in Paris vs. Vail 18 Vt., 277. All the property sold had a potential existence when the mortgage was executed and recorded as required by law. The referee has found that 'the livery stock as it existed on May 16, 1900, was all acquired by exchange of the original stock, or with the avails of the old stock sold, or money derived from the business,' that is, from its use. Every article of the acquired livery property came from the old livery stock and was potentially in it. It was also strictly within the terms of the mortgage and the understanding of the parties of the manner in which Moore should conduct and manage the livery property. Every horse, carriage and other article of the livery stock as it existed May 16, 1900, came in the course stipulated to be pursued, from the livery stock as it existed April 15, 1891, as much, and more so than crops which have to be sown and raised from real estate, or the progeny of mares and cows which have to be bred and cared for by man, or the butter and cheese produced from cows by the labor and care of the dairyman, or the belts and parts of machines and machinery which become worn and have to be replaced with new, or the rolling stock of railroads which becomes worn by use and is replaced by new, or repaired engines and cars. Yet in all these cases it has been held that the after produced articles coming from the proper handling and management of the property originally mortgaged were potentially in the original when mortgaged, and not property in the eye of the law which did not exist when the mortgage was executed.

Smith vs. Atkins, 18 Vt., 461.
Bellows vs. Wells, 36 Vt., 599.
Brainard vs. Peck & Colby, 34 Vt., 496.
Paris vs. Vail, 18 Vt., 277.
Baxter vs. Bush, 29 Vt., 465.

"In Bellows vs. Wells, supra, the mortgage of the crops to be grown on the leased premises to secure the payment of the rent was not given until a year after the lease was given. The crops mortgaged could not have been reserved in the lease. Notwithstanding this, and that the point was made that to be a valid mortgage of cultivated crops, against attaching creditors, the mortgagee must have taken possession before the attachment was made, this court held the mortgage to be a valid mortgage against such attachment. In Allen's Estate, 65 Vt. 395, Taft, Judge, defining what property may be mortgaged, says the general rule is 'that a mortgage of chattels can operate only on property actually in existence at the time of giving the mortgage, and then actually belonging to the mortgagor or potentially belonging to him, as an incident of other property then in existence.'

"Moody v. Wright, (13 Metcalf 17), 46 American Decisions 706 and note. 'Things not having an actual existence but having a potential existence, i. e., things which are the natural product or increase of something already existing and the property of the mortgagor, may be the subject of a valid mortgage.'

"The case of Mitchell v. Winslow, 2 Story 230, is a leading American case upon this subject. A mortgage was given in that case by two manufacturers of cutlery upon all the tools and machinery in their manufactory, and upon all the tools and machinery which they might purchase within four years, and all stock that they might manufacture during the same time. It was held to create a good, equitable lien and was protected as such under the Bankrupt Act. At page 644 Story, J., said: 'It seems to me a clear result of all the authorities, that wherever the parties, by their contract, intend to create a positive lien or charge, either upon real or personal

property, whether then owned by the assignor, or contractor, or not, or, if personal property, whether it is then in *esse* or not, it attaches in equity as a lien or charge upon the particular property as soon as the assignor or contractor acquires a title thereto against the latter, and all persons asserting a claim thereto under him, either voluntarily, or with notice, or in bankruptcy.'

Gregg v. Sanford, (24 Ill., 17,) 76 Am. Decisions 719 and note.

"'After acquired property may be mortgaged, and it will be subject to the mortgage lien if the mortgage deed be properly executed, acknowledged and recorded, or if possession be taken of the property before any other lien has attached.'

Peabody v. Landon, (61 Vt. 318;) 15 Am. St. Reports 803, and extended note.

Francesco v. Ryan, (54 Ohio State 307;) 56 Am. St. R. 711, and note."

If the mortgage covered all the property described in it as contended on this point, the bankrupt's creditors neither had nor could acquire any interest in the property described therein.

b. The mortgage of April 15, 1891, gave the defendant the right to take possession of the after acquired livery property at any time, whether the debt and liability secured were under or over due, without the consent of bankrupt.

Landon vs. Peabody, 61 Vt. 318.

Langey vs. Leach, 57 Vt. 377.

McLeod vs. Wakefield, 70 Vt. 558.

It created a lien on all the property described in it, after acquired, as well as that existing when the mortgage was given. Its record was notice of its terms to all who undertook to act with reference to the property. It

was *prima facie* bona fide and valid against the bankrupt and his creditors and placed on them, if they would acquire any rights therein, the burden of establishing that it was fraudulent. The only badge of fraud that could be relied upon by bankrupt's creditors if they attached the after acquired property, was the fact that it remained in bankrupt's possession. When defendant took possession before the creditors of the bankrupt attached the after acquired property, this badge was removed and thereafter the burden was on the plaintiff to establish there was actual fraud in giving the mortgage, and that it was given, to give the defendant a preference or to hinder or delay his creditors in securing payment of their debts, neither of which are established by the plaintiff.

See cases last above cited.

The defendant's contention, on this point, in the State Court was as follows, and is here produced that the language of the opinion may be more readily understood. "The mortgage of April 15, 1891, between the parties, was a valid agreement to place the after acquired livery property under the terms of the mortgage, and created an equitable lien thereon. By purchasing the after acquired property with the mortgaged property, or its avail, and by placing and using it in the livery stock, the bankrupt placed it under the operation of the mortgage. The defendant, by taking possession of it by force of the mortgage, accepted it as included in the mortgage, as of the date of the mortgage. Besides, the placing of the after acquired property with the original property with the intent, found by the referee, to have the mortgage operate thereon, the bankrupt did acts beneficial to the defendant, and the law presumes that the defendant accepts them even without the defendant's taking possession. The record of the mortgage in terms applying to the after acquired

property was constructive notice to all Mr. Moore's creditors, and all who might have dealings with him in regard to it, that the after acquired property was pledged to the defendant to secure and indemnify the defendant against all liabilities assumed by him for Mr. Moore. The defendant's existing liabilities for Mr. Moore when the mortgage was executed, and which remained when the mortgage was foreclosed, far exceed the amount received from the foreclosure of the mortgage. This court in Peabody v. Landon, 61 Vt. 318 (page 329), held, "When so taken possession of before seizure by other creditors, the goods come under the cover and operation of the mortgage as of its date." Judge Wheeler so says in his opinion, denying the trustee's petition to have Ryan's attachment kept on foot for the benefit of the bankrupt's estate. By the adjudication in bankruptcy that attachment was dissolved and did not disturb the operation of the mortgage upon the livery stock. The fact that the defendant knew that Moore was insolvent and "considering bankruptcy," cannot defeat the effect of the act of the defendant in taking possession under the mortgage, when it is found by the referee that thereby "the defendant did not intend to perpetrate any actual fraud on the other creditors or any of them, but he did intend thereby to perfect his lien on the livery property and make it available for the payment of his debts before other complications by way of attachment or bankruptcy arose." At that time there was no petition filed to have Moore adjudged a bankrupt, and no certainty that there ever would be any. Taking possession with these intentions, the defendant was doing no more than he had a lawful right to do. In other words, he was exercising his lawful rights as determined by the mortgage, and no more. The fact that he knew Moore was insolvent did not bar the

defendant from exercising his lawful rights created by the mortgage, more than six years before that time. It is evident Judge Wheeler so thought when he denied the trustee's petition to have Ryan's attachment kept on foot; but as the facts before him did not show that defendant's debt and liabilities, except, possibly, for a small amount, existed more than four months before Moore's petition in bankruptcy was filed, he thought it was doubtful if the defendant could, within four months of the filing of bankrupt's petition, create the indebtedness or come under the liabilities secured by the mortgage, and make the mortgage valid against other creditors by taking possession within the four months, having knowledge that Moore was insolvent,—a very different question from the one now presented for the consideration of this court. Under the facts found by the referee, the taking possession of the after acquired livery property by the defendant and the consent given thereto by the bankrupt himself, was not a preference under the bankrupt act. While the possession was taken within the four months of the filing of the voluntary petition by Moore to be adjudged a bankrupt, it was all done in accordance with the terms of the mortgage of April 15, 1891, and the rights of the defendant under it. These rights originated more than eight years before the petition was filed. On the facts, this is a stronger case against a preference than Sabin vs. Camp, 98 Fed. R. 974. The head note of that case is as follows: "A transfer of property to a creditor by a debtor within four months prior to his adjudication as a bankrupt does not constitute a preference under the bankrupt law in the absence of fraud where the transfer was made pursuant to the terms of a prior contract under which the transferee advanced money with which property was acquired, reserving a lien thereon and an option, in

case of default in payment to purchase the property at a fixed price, deducting therefrom his advances."

To the same effect are:

In Re E. M. Chapman, 3d B. K. R. 607.

Chattanooga Nat. Bank vs. Roane Iron Co., 102 Fed. R. 755.

3 Pom. Eq. Jurisprudence, Secs. 1236, 1283, 1288, note 3.

Walker vs. Brown (165 U. S. 654) 41 L. Ed. 865.

Ketchum vs. St. Louis (101 U. S. 306) 25 L. Ed. 999.

Paris vs. Vail, 18 Vt. 277. See Opinions Redfield and of Ch. J. Williams.

Coty vs. Barnes, 20 Vt. 78.

5. The Supreme Court of Vermont, in its determination the questions which were passed upon by it, touching the bankruptcy proceedings, properly, correctly and legally construed the provisions of the bankruptcy act of 1898, so far as the plaintiff in error raised such questions in that Court, and this Court has no jurisdiction to review any others. The record does not show that any others were raised.

a. The Court held that the Ryan attachment which was made within four months of the filing of the petition in bankruptcy, was void, as well as the Passumpsic Savings Bank mortgage under the provisions of the bankrupt law.

This decision was in exact accord with the provisions of Sec. 67 bankrupt law of 1898.

The plaintiff in error urged that with the annulment of the Ryan attachment the property affected by it passed to the trustee, as a part of the estate of the bankrupt under the express provisions of Sec. 67*f*.

This was the only question raised by the plaintiff in

error on the trial in the Supreme Court touching his rights under the Ryan attachment. He made no claim there, under the Passumpsic Savings Bank mortgage, and none was passed upon by the Supreme Court.

The plaintiff in error having first elected to make his application to the Court of bankruptcy for an order from that Court, that the attachment lien be preserved for the benefit of the estate, and that application having been denied, the Court of Vermont was correct in holding that unless the attachment lien is preserved by an order of the Court, the property, "as in the case at bar, may be held upon some other lien, and not passed to the trustee."

In Re Sentenne & Green Co., 120 Fed. R. 436.

Pages 31, and 32 of the record.

b. The Supreme Court of Vermont held that there was no finding of fact, "that the bankrupt's parting with possession of the mortgaged property was with the purpose on his his part to hinder, delay, or defaud his creditors, or either of them," and that without a finding to that effect it cannot be said that there was any invalid transfer of the property within the provisions of Sec. 67*e* of the bankrupt law.

The case of Sabin vs. Camp, 98 Fed. 974, and Meys vs. Fritton, 87 U. S. 414, 22 L. Ed. 389 are authorities for such decision.

c. What is a preference under the Bankrupt Act of 1898?

In determining whether taking possession and the foreclosure of the mortgage of April 15th, 1891, was a preference under the Act of 1898, its following provisions should be considered. Section 3, defining Acts of Bankruptcy, subdivision (3) reading, "Or suffered or permitted while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five

days before a sale or final disposition of any property affected by such preference vacated or discharged such preference."

Sec. 60*a*, "A person shall be deemed to have given a preference if, being insolvent he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

Sec. 67, Liens a. "Claims which for want of record or for other reason would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate."

c. "A lien created by or obtained in or pursuant to any suit or proceeding at law or in Equity, including an attachment upon, mesne process, or a judgment by confession which was begun against a person within four months, before filing of a petition in bankruptcy by or against such person, shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained or permitted while the defendant was insolvent and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act.

d, Liens given or accepted in good faith and not in contemplation of or in fraud upon this act and for a present consideration which has been recorded according to law if record thereof was necessary in order to impart notice shall not be affected by this act." Last sentence

of e "And all conveyances, transfers, or incumbrances of his property made by a debtor at any time within four months prior to the filing of the petition against him and while insolvent which are held null and void as against the creditors of such debtor by the laws of the State, territory or district in which such property is situated, shall be deemed null and void under this act against the creditors of such debtor if he be adjudged a bankrupt, and such property shall pass to the assignee and be by him reclaimed and recovered for the benefit of the creditors of bankrupt."

Impliedly the converse of this must be true.

f, "That all levies, judgments, attachments, and other liens obtained through legal proceedings against a person who is insolvent, at any time within four months, prior to the filing of a petition in bankruptcy against him shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment, or other lien shall be deemed wholly discharged or released from the same and shall pass to the trustee as a part of the estate of the bankrupt unless" etc., "provided that nothing herein contained shall have the effect to destroy or impair the title obtained by such levy, judgment, attachment or other lien of a bona fide purchaser for value who shall acquire the same without notice or reasonable cause for inquiry."

These are all the provisions of the act that have any bearing upon the question in this case. They are all to be considered in determining what under them is a legal preference. The crucial point of them all is when did the mortgage become operative upon the after acquired property? The Supreme Court of Vermont has held and announced repeatedly that such mortgages become operative if possession is taken by the mortgagee, as of

its date, certainly as soon as the property was acquired. Under this holding the bankrupt did not not suffer nor permit under subdivision 3 of section 3 the defendant to obtain a preference, after he was insolvent. So, too, were all the changes in the livery stock, so far as found, before he became insolvent. It is found by the referee that he became insolvent "Shortly prior to March 5th, 1900," and no changes were made in the livery stock after that date, is also found by him. The defendant had the right to take possession of the livery stock, a right given to him under the mortgage when it was executed. Hence the bankrupt could not suffer or permit what defendant had for years had a legal right to do.

Nor was this act under section 60*a*, a preference, for the bankrupt while insolvent neither suffered nor permitted the foreclosure of the mortgage,—that was authorized by the statute—nor made a transfer of any of the property while he was insolvent. This also had its origin long before he was insolvent. Nor did the foreclosure of the mortgage give defendant any greater percentage of his debt and liability "than any other of such creditors of the same class."

The lien created by the mortgage on this livery stock was duly recorded according to the statute and is not void against creditors for that or any other reason under section 67*a*; nor under (c) for it was a proceeding in equity begun when the mortgage was duly made and recorded; that was the commencement of the equitable proceeding which culminated in the sale of the property and payment of the nine hundred and twenty-two dollars and eight cents to the defendant; a proceeding begun years before instead of within four months of filing the petition in bankruptcy, and when the bankrupt was entirely solvent.

The lien created by the mortgage when bankrupt was solvent is declared valid by Section 67*d*. It was given and accepted in good faith not in contemplation of or in fraud upon the act and for a consideration then rendered by the defendant, the lending of defendant's credit to the bankrupt by which he was enabled to purchase the livery stock.

The Supreme Court of Vermont has repeatedly declared such mortgages and proceedings good against the insolvent law of the State and therefore impliedly valid under the last sentence of 67*f*. It was a lien acquired by defendant as a bona fide purchaser for value without notice or reasonable cause for inquiry.

The cases relied upon by the plaintiff in error, Mathews vs. Hardt, 9 Am. Bk. R. 375; Tatman vs. Humphrey, 184 Mass. 361, and the other cases cited by him are not in principle analogous to the case at bar. In those cases the lien was a secret lien, existing solely between the parties, and not one created by a legally executed and recorded chattel mortgage. In those cases there was no lawful written instrument signed and sworn to by the parties and placed on record when the bankrupt was solvent for notice to all creditors and purchasers which was the original process, and constituted the beginning of the equitable proceedings, as is true in this case, and which later, when the bankrupt had become insolvent, culminated by the ordinary operations of law, in the legal sale of the property specified in the mortgage, and the passing over of the avails of the sale to the mortgagee, to satisfy in whole or in part only, as in this case, the indebtedness and liabilities which the mortgagee assumed in reliance upon it when the mortgage was given, and when the property sold was the very property on hand when the mortgage was given or property procured with that

property by exchange, or with money which came from its use or sale.

The case at bar contains all the elements specified which are lacking in the cases cited by the plaintiff.

The Supreme Court of Vermont correctly disposed of the questions of the claimed preference in accordance with the decisions of this Court. We quote from the opinion, pages 34, 35, and 36 of the record:

"There is no finding that the defendant or his agent had reasonable cause to believe that by the change of possession it was intended to give a preference. This fact must affirmatively appear. We cannot infer it from the other facts reported. Darby vs. National Bank, 57 Vt. 52 370. The fair construction of the findings is that the parties were but carrying out the provisions of the contract of mortgage as it was well understood between them before the bankrupt act was passed, with a view to their respective rights under the contract, rather than any preference was intended by either. Nor does the property covered by defendant's mortgage pass to the trustee under the provisions of subdivision f, whereby all levies, judgments, attachments, or other liens, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him are deemed null and void in case he be adjudged a bankrupt, and the property affected thereby is deemed wholly discharged and released from such lien and passes to the trustee as a part of the estate.

The question of intent does not arise under these provisions, but to come within them the lien in question must have been obtained through legal proceedings within the prohibited period. It cannot be said that the creation of a lien is the same as the enforcement of one already creat-

ed. Assuming that the taking and sale of personal property by a public officer upon a statutory chattel mortgage under the provisions of V. S. 2265-2268, constitutes a legal proceeding within the meaning of the above provisions of the bankrupt law, as was recently held by Wheeler, J., in the matter of Parker P. Ball, bankrupt, 123 Fed. 164, it does not follow that the mortgage lien is thereby rendered null and void; for instead of being a lien obtained through such legal proceedings, it is an existing lien by constract enforced by them.

As already seen, the defendant's lien under this mortgage at common law was one that gave him an absolute legal title after forfeiture, which occurred before possession was taken by him. But it was necessary that a change of possession be had to render his title operative
53 against the other creditors of the mortgagor. Tobias vs. Francis, 3 Vt. 425; Woodward vs. Gates, 9 Vt. 358; Rice's Assignees vs. Hulett, before cited. After forfeiture the defendant had the right to sell the property in satisfaction of his debts. Wood vs. Dudley, before cited. Jones Chat. Mort. s. 707; Freeman vs. Freeman, 17 N. J. Eq. 44. And the sale, being with the mortgagor's consent, operated as a formal foreclosure of his equitable right of redemption. Jones Chat. Mort., s. 709.

The construction of section 67 f, has recently been under consideration in the case of Metcalf vs. Barber, 187 U. S. 165; 9 Am. B. R. 36. In an opinion delivered by Mr. Chief Justice Fuller, the Court said: "In our opinion the conclusion to be drawn from this language is that it is the lien created by a levy, or a judgment or an attachment, or otherwise that is invalidated, and that where the lien is obtained more than four months prior to the filing of the petition, it is not only not to be deemed to be null and void an adjudication, but its validity is recog-

nized. When it is obtained within four months, the property is discharged thereupon, but not otherwise. A judgment or decree in enforcement of an otherwise valid preexisting lien is not the judgment denounced by the statute, which is plainly confined to judgments creating liens. If this were not so, the date of the acquisition of a lien by attachment or creditor's bill would be entirely immaterial."

Nor is the case of Wilson vs. Nelson, 183 U. S. 191, 46 L. Ed. 147, upon which the plaintiff relies, to the contrary. There Nelson borrowed the sum of money before the bankrupt law was enacted, and gave his promissory note therefor with an irrevocable power of attorney executed by him attached thereto authorizing any attorney of a court of record in his name to confess judgment thereon after its maturity. After the passage of the bank-
54 rupt act, the owner of the note caused judgment to be entered upon the note and the warrant of attorney. Upon this judgment an execution was issued and the same was levied on Nelson's goods which were subsequently sold, and the proceeds were applied in part payment of the judgment. These proceedings were wholly without Nelson's knowledge or consent. More than five days after the levy, but before the sale of the goods, a petition in bankruptcy was filed against Nelson, and the sole question before the court was whether he had committed an act of bankruptcy within the meaning of sec. 3, cl. 3, of the bankrupt law. In considering the case, the court discussed to some extent the provisions of sec. 67 subdivision f. In that case, unlike the one at bar, no lien existed upon the bankrupt's property until one was created by the levy of the execution, which brought it expressly within the terms of subdivision f. It is there said that the bankrupt act makes the result obtained by

the creditor, and not the specific intent of the debtor, the essential fact; and that the levy, which was in a proceeding begun within the four months, would be dissolved by the adjudication in bankruptcy because its existence and enforcement would work a preference; and it was held that the debtor, by failing to vacate or discharge the preference within five days before the sale of the property on the execution, committed an act of bankruptcy."

So far as the record discloses the plaintiff in error made no claim in the Supreme Court of Vermont, that under the claimed agreement between the respective attorneys for the bankrupt, and the defendant, that the fund to be realized from the sale of the mortgaged property, was to be held by the officer in place of the property and paid over to whoever might be entitled to the same, nor that the defendant was a party to such arrangement or ever had any knowledge of the same, nor that his rights were in any way affected by such claimed agreement.

The Court in Vermont did not pass upon any such question, nor so far as the record discloses was it called upon so to do, and so that question is not open for review by this Court.

Under the decisions cited this question is immaterial as the defendant had the legal right to take possession of the mortgaged property as he did without the consent of the bankrupt. The possession is the important matter for consideration upon this branch of the case. It was conceded on trial, and found by referee that all the proceedings in the foreclosure of the mortgage of April 15, 1891, were strictly in compliance with the law of the State of Vermont, Vermont Statutes, Secs. 2264, to 2268.

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